IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-323

IN THE MATTER OF THE WITNESS
CHARLES G. BERRY

Petitioner

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Charles G. Berry, respectfully prays that a rehearing of the order denying the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered August 1, 1975, be granted.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 521 F.2d 179 (1975) and the two opinions of the United States District Court for the District of New Mexico have not been reported. All three opinions are reproduced in the Appendix of the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit, entered on August 1, 1975, directed that no petition for rehearing may be filed, and ordered the mandate stayed for a period of thirty (30) days in antici-

pation that petitioner would file a Petition for a Writ of Certiorari. The Petition for Certiorari was filed August 29, 1975. Certiorari was denied November 3, 1975. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

Note: The questions presented for review remain the same as stated in the Petition; however, respondent stated the questions to be materially different (Resp. 2) and in order to make clear all issues deemed by petitioner to be implicit in the questions presented, they are restated as follows:

1. Whether a federal prosecutor has *any* obligation to make a showing of necessity or produce evidence of materiality to establish the reasonableness of a grand jury subpoena duces tecum which has been challenged upon Fourth Amendment grounds. If so, (1) is an unsworn statement of an assistant United States Attorney sufficient, (2) must evidence be presented or is an affidavit sufficient, (3) what elements must be established, (4) is the subpoenaed witness entitled to test the accuracy or controvert such evidence?

2. Whether, assuming the facts as stated in the federal prosecutor's proffer have been sufficiently established, in an analysis of all the circumstances of the case, it has been shown that the subpoena is not unreasonable.

3. Whether financial records of a law firm which disclose details of transactions engaged in by the firm in the course of representation of its clients are protected by the attorney-client privilege from subpoena by a federal grand jury.

4. Whether records of trust accounts maintained by a law firm for the handling of funds belonging to clients, that

have come into the firm's hands pursuant to the attorney-client relationship, are protected by the attorney-client privilege.

5. Whether a client may assert Fifth Amendment right against self-incrimination as to his attorney's records of trust account funds handled by the attorney in behalf of the client.

6. Whether (assuming the client may assert such right) an attorney may raise the Fifth Amendment right against self-incrimination as to trust account records for the client before a federal grand jury which has subpoenaed the records.

7. Whether the thirty-day limitation provision of 28 U.S.C. §1826(b) deprived appellant of his right to appeal.

GROUNDS FOR GRANTING THIS PETITION

Because of his strong feeling that this case presents important issues reaching far beyond his own personal interests and because there exist intervening circumstances and grounds not previously presented of a substantial and controlling nature, petitioner is submitting this petition for rehearing.

In support of this petition, petitioner will offer (1) an important statement issued by the United States Department of Justice admitting that federal grand juries no longer serve a protective function and conceding that this institution has become merely a convenient tool for federal prosecutors, (2) decisions by the Ninth and Third Circuit Courts of Appeal which conflict with the holding of the court below regarding petitioner's right to an evidentiary hearing, and (3) two recent opinions, one by the Fifth Circuit Court of Appeals and one by the Federal District Court for the Southern District of New York, which hold,

contrary to the holding below, that the records covered by this subpoena are protected by the attorney-client privilege.

Petitioner will also seek to clarify the questions presented for review, assure the Court that the issues have all been properly preserved for review, and show that petitioner's position below was at all times asserted in good faith.

CLARIFICATION OF THE ISSUES

Petitioner is well aware that from the beginning he has not gained a single favorable ruling of any substance, and fearing that the real issues in this case may have been clouded by the claims of bad faith and waiver, petitioner would ask the indulgence of the Court for an opportunity to clarify these aspects as he sees them.[1] It is hoped that in so doing the issues presented for review will be revealed as being concise, distinctive and appropriate.[2]

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[1]A reply brief attempting to clarify these points was prepared; however, because of delays in transportation between Washingtfon, D.C. and Albuquerque, New Mexico, and printing schedules, it was not filed prior to entry of the order denying certiorari.

[2]Petitioner is aware that the Supreme Court has granted certiorari upon petition of the government to review questions which are similar and may be related to those presented here, in the cases of *United States v. Kazmir*, 499 U.S. 444, cert. granted 420 U.S. 906, and *United States v. Miller*, 500 F.2d 751, cert. granted June 9, 1975, No. 74-1179.

As noted in the petition (Pet. 28), the facts of this case are distinguishable from those in *Kazmir*, supra, in that Kazmir involved an investigation of only one client whereas this case involves an attempt to discover information involving a large number of clients, and it is probably more appropriately a Fourth Amendment question as opposed to a Fifth Amendment question.

In *Miller*, supra, the opinion issued by the Court of Appeals does not remotely touch upon issues involved in this case. It should be noted, however, that the government's petition for certiorari requested, under circumstances highly favorable to the government position and where the issue is not really material to the outcome of a case, the question of "whether . . . a grand jury subpoena duces tecum is defective and violative of the Fourth Amendment . . . (b)ecause (it) . . . demanded production of *all records* relating to a named depositor for a period of approximately four months."

The government's willingness to litigate the issues in these cases is inconsistent with the position taken here where all aspects of the inquiry are fully developed and material to a resolution of important constitutional problems. Accordingly, the fact that the Court has agreed to review the issues presented in these cases should encourage rather than weigh against review of the issues here presented.

1. *All issues are properly before the Court for review.*

Respondent says the Fourth Amendment issue is not a proper issue on appeal (Resp. 21). It seems that the contention is that by delivering the records to the District Court for *in camera* inspection, petitioner somehow lost his right to litigate this issue. It is not clear from the argument exactly what mechanics or under what rule of law or procedure this loss occurred.[3]

Respondent's position in this regard has been somewhat misleading and not entirely consistent. It is misleading in that petitioner did not comply "with the terms of the subpoena" (Resp. 21).[4] Rather, petitioner merely complied with the District Court's order to deliver the records to the court for *in camera* inspection.[5] Only a very small portion

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[3]The Court of Appeals states it as follows: ". . . Nevertheless, he had fulfilled the requirements of the subpoena duces tecum and thus he is at present in a poor position to contend that there was a violation of the Fourth Amendment. As we view it he sought to have the best of both worlds, that is, he made a show of presenting the documents in response to the subpoena duces tecum so as to get out of jail and tried, at the same time, to preserve his objections. We conclude, as did the trial court, that he did not succeed. (Pet. App. 36a.)

[4]The second motion filed by the prosecutor requesting that the court hold petitioner in contempt stated: "That on May 19, 1975, the witness Charles G. Berry appeared before the Federal Grand Jury and, in compliance with this Court's Order of April 25, 1975, produced one box of financial records which box was moved into evidence before the Grand Jury. In addition, and also in compliance with this Court's Order of April 25, 1975, Mr. Berry identified and there were marked 34 additional boxes of financial records plus three ledgers as to which Mr. Berry asserted some type of privilege. Basically, the records contained in these 34 boxes of financial records . . . were canceled checks, bank statements, voucher and receipt books, as well as client account cards." (Motion for confinement filed by the United States June 27, 1975.) See also, Footnote 7, infra.

[5]This was a verbal order rendered by the Court April 25, 1975: "Now, with that it will be the order of the court that Mr. Berry, that next Wednesday morning at nine a.m., you appear before the grand jury and comply with the subpoena, identifying at that time the various records that you claim a privilege, as to which privilege is claimed, and otherwise, producing before the grand jury the records sought in the subpoena as to which no privilege is claimed. Other records to be produced — or be available at that time for identification and submittal to the Court for inspection in camera, as to a claim of privilege, if that is sought by anybody by either side." (Tr. Vol. I, 97.) Petitioner was further advised that if the court indicated the privileges claimed were not applicable, the records would be "furnished to the grand jury and if the witness has any objection, the record is made of that." (Tr. Vol. I, 95-96.)

of records were released to the grand jury.[6] Those are not a part of this appeal. The position is inconsistent in that in the District Court, respondent recognized petitioner's right to litigate the issue,[7] whereas the contention that petitioner had complied with the subpoena was first raised in the Court of Appeals.[8]

There is no legal authority cited for respondent's position. Nor has respondent suggested any legal theory that would support it.

The term "waiver" was used in the Court of Appeals.[9] However, the law of waiver as applied to constitutional rights follows some rather well defined lines. In order for there to be a "waiver" of Fourth Amendment rights, there

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[6]See Tr. Vol. IV, 310-319. This was done pursuant to an arrangement worked out on May 16, 1975. (Tr. Vol. III, 281-286.) (See also, Footnote 7, infra.)

[7]In the memorandum brief filed in the District Court by the federal prosecutor, it was asserted that the petitioner had waived his objection to those records which were handed over to the grand jury for their inspection (Grand Jury Exhibit 841 only) and that: *"The balance of the records (Grand Jury Exhibits 842-878) were not turned over to the grand jury,* but were produced for in camera inspection by the court on various claims of privilege. *As to those records, we will assume arguendo, but without conceding the point, that Mr. Berry can still litigate the Fourth Amendment issue* by submitting to a new contempt adjudication if the court should find after in camera inspection that some of the records are not privileged and order Mr. Berry to produce those privileged records before the grand jury." (Emphasis added.) (Government's Response to the Memorandum of Points and Authorities Concerning Berry's Objections to the Grand Jury Subpoena, filed June 3, 1975.)

[8]The first time respondent raised the claim that petitioner had complied with the subpoena was in the brief of the United States filed in the Court of Appeals: ". . . as of May 19, 1975, Mr. Berry had fully complied with the subpoena duces tecum. . . " (Brief of the United States filed in the Tenth Circuit Court of Appeals July 25, 1975, pp. 24-25.) Inasmuch as the Court of Appeals required the briefs to be filed simultaneously and no motion for rehearing was permitted, petitioner was never afforded an opportunity to clarify this point.

[9]Pet. App. 35a.

must be a "voluntary relinquishment" of that right."[10] *Johnson v. United States,* 68 S.Ct. 367 (1947); *Schneckloth v. Bustamonte,* 93 S.Ct. 2041, 412 U.S. 218 (1973).

It is therefore difficult to see how there could be any waiver when there has been no relinquishment.[11] Certainly it cannot be contended that by boxing the records up and delivering them to the District Court, petitioner lost his right to refuse to deliver the records to the grand jury on the basis that it was burdensome to do so. But even so, the burden of boxing the records and delivering them is only one minor aspect of the Fourth Amendment protection as it applies to these records.[12] Respondent and the courts below fail to recognize that the Fourth Amendment has intrinsic aspects as well as extrinsic aspects. *Schwimmer v. United States,* 232 F.2d 855 (8th Cir. 1956). The mere fact

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[10]The language of the Court of Appeals that petitioner ". . . sought to have the best of two worlds. . ." is misdirected. What petitioner did was attempt to resolve the apparent conflict created by the court's implication that petitioner was as much in contempt for not delivering the records for *in camera* inspection as for not giving them to the grand jury. In denying bail following the first contempt, the court said: ". . . From the moment this subpoena was filed or brought to my attention two days after it was filed, there has been every effort to fight the subpoena and that certainly, of course, is entirely proper and correct that every defense should be pursued. However, I — a review of the entire proceeding shows to me that there has been during that whole time an entire effort to fight this subpoena and there has been no effort to even partially comply with the subpoena or to properly and legally assert constitutional privilege against incrimination (sic), attorney-client, or other valid constitutional privilege." (Tr. Vol. II, 249-250.) Thus being stung by the words of the court, in an attempt to resolve this dilemma after being jailed for eight days, petitioner sought a hearing wherein he advised the court of his concern about the records being delivered to the grand jury pending an appeal (Vol. I, 97), should the court rule against him on *in camera* inspection (Tr. Vol. III, 266, 267, 278, 279) and submitted a proposal to comply with the court's order, with the understanding that on *in camera* inspection: ". . . the court could properly take a look at the Fourth Amendment issue as to all the records with the intrinsic-type question before it. I mean, before it in the form of records. At that time, if the Court did not feel that the objections were well taken, that the matters could be sealed and an appeal be taken, if we are dissatisfied." (Tr. Vol. III, 261.)

[11]See Footnotes 4 and 7, supra.

[12]As pointed out in the petition (Pet. 22), the Fourth Amendment also protects infringement of attorney-client privilege, attorney work product, Fifth Amendment right against self-incrimination on the part of clients, right of privacy and right to counsel, along with a host of other rights which were asserted in the court below.

that petitioner delivered one box of records certainly cannot amount to a waiver as to the remaining records, for a search pursuant to a limited consent cannot go beyond the limits of that consent. *Schneckloth v. Bustamonte,* supra.[13]

If we accept the logic of the Court of Appeals, no question of waiver would have arisen had petitioner delivered the records for *in camera* inspection on April 30 without submitting to the first contempt.

Most certainly it cannot be claimed the issue became moot. Possibly, insofar as that small group of records which were released to the grand jury, the issue is moot as to this particular litigation. But as to the remaining records which have not been released to the grand jury, petitioner is presently in jail for refusal to release them, and the respondent still wants them.[14] Only by delivery can petitioner obtain his freedom.[15]

Nor can it be said petitioner has not presented this question for determination at every possible opportunity.[16]

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[13]Even as to that small portion of records which were released to the grand jury and are not a part of this appeal, arguably since they were delivered under threat of confinement, the illegal search can be raised by motion to suppress in a subsequent criminal case.

[14]*Powell v. McCormack*, 89 S.Ct. 1944, 395 U.S. 486, 23 L.Ed.2d 491; *Sibran v. New York*, 88 S.Ct. 1889, 392 U.S. 400 (1968); *St. Pierre v. United States*, 319 U.S. 41, 87 L.Ed. 1199 (1943); Annotation: 87 L.Ed. 1201 at 1207: "A moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right, before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then existing controversy."

[15]The statement that petitioner has "complied with the term of the subpoena" is ridiculous. If he had, he would not be in jail.

[16]Tr. Vol. III, 291; Vol. IV, 309-310, 385-386; Vol. VIII, 752, 754-757, 761, 765-773, 830, 831, 896; Vol. IX, 925, 926; Vol. X, 975-984, 998, 1004-1009; Vol. XII, 1060-1062, 1082. See preface to Vol. I of objections and brief of petitioner filed in the District Court May 20, 1975. The federal prosecutor conceded as much on May 19, 1975, when he stated: "I assume throughout this you have preserved for the record throughout this proceeding the Fourth Amendment issue, and you are objecting to producing any records on the ground of the Fourth Amendment. We will assume that is a continuing objection." (Tr. Vol. IV, 320.)

Where a matter has been properly raised in the lower court by pleading, evidence, motion, or appropriate requests for rulings, it is sufficiently presented for review on appeal. *United States v. Hayashi,* 282 F.2d 599 (9th Cir. 1960); *Goodis v. United Artists Television,* 425 F.2d 397 (2nd Cir. 1970); *Lipman v. Arlington,* 192 F.2d 93 (7th Cir. 1951); 4 C.J.S. 751, *Appeal and Error* §243.

It is therefore submitted that the issue of the Fourth Amendment is properly before the Court for review, at least sufficiently that this Court should review the question of whether, by following the procedure outlined by the District Court, petitioner lost his right to litigate it.

2. *Petitioner's position below was at all times asserted in good faith.*

> The trial court, ruling upon petitioner's position, said: "Mr. Berry has repeatedly continued to raise the Fourth Amendment claim that the subpoena is overbroad and oppressive . . . he has spent considerable effort building a record as to why it is oppressive . . . he has asserted a host of privileges as to the various financial records, a substantial portion of which are so patently frivolous that they cannot be claimed in good faith . . .
>
> "The short answer to Mr. Berry's objection is that he should assert only those privileges he can raise in good faith . . .
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> * * *
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> "In light of the above findings, it is with great regret that the Court must conclude that Mr. Berry has not proceeded in good faith in stating privileges he claims as to specific documents and has only sought to delay the proceedings of the grand jury." (Pet.App. 6a-8a).

The Court of Appeals accepted this conclusion:

> "In rejecting these wide-ranging claims, the Court commented that many were frivolous and not made in good faith . . .
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> • • •
>
> "Time does not permit, and no good purpose would be served by, any detailed analysis of witnesses' claims of privilege relating to the cartons of papers and ledgers. The court carefully considered the many objections and overruled them . . . We are convinced that the trial court made no error affecting any substantial rights of witness." (Pet.App. 40a.)

Although the question of petitioner's good faith is not controlling to any of the questions presented for review, it appears to have had a clouding effect upon the issues and, therefore, it is deemed important to make it clear that at no time did petitioner consider this anything other than a most serious matter and assert his position based upon anything other than sound legal principles.

The trial court failed to consider or answer petitioner's contention that the records were so intermingled as to make any reasonable segregation of non-privileged records or any meaningful categorization for statement of objections impossible, and that to be required to do so was itself violative of the Fourth Amendment. There was a complete failure to recognize that in this case, burdensomeness and oppressiveness do not refer to the trouble of boxing up all the records and delivering them to the courthouse, but rather to the impossible task of effecting a meaningful segregation. Apparently the lower courts did not realize that what is called for by this subpoena is an entire integrated record-keeping system and that an objection to any particular document must also take into consideration that document's relationship to all the other records.

The lack of understanding of the system is evidenced by the ruling which held that the grand jury must be allowed to examine "all of the firm's financial records" (Pet.App. 8a) and yet withheld the client ledger cards[17] and records pertaining to pending federal criminal cases (Pet.App. 8a, 9a).[18]

Failure to understand petitioner's objection is also shown by the court's statement:

> "... thus, for example, he refuses to produce cancelled checks because these relate to disbursements made on behalf of a client and are reflected on a client card" (Pet.App. 7a).

First of all, there could be no real objection to delivery of the cancelled checks of the general account alone, because all the information contained on the face of those checks is itemized in the general journal (Grand Jury Exhibit 841) which was given to the grand jury (Tr. Vol. IV, 310-319). However, the trial court failed to note (and you can tell only by physical examination of the records themselves) that the cancelled checks have been removed from the bank statements and are stapled to their matching voucher. The matching voucher, in addition to all the information on the check, will reveal the account number or client to whom the matter is charged. Since the prosecutor already has, in the general journal, all the information contained on the face of the checks, nothing could be gained by requiring petitioner to go through and separate them from the vouchers.[19] The

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[17]The client cards filled nine crates, almost one-third of the records by volume. This reasoning overlooks the fact that if there has been falsification of records to show false charges, the most obvious place to find them is on the client cards which show this type of entry and transactions, not the receipts and canceled checks which cannot be easily falsified (Tr. 655-658).

[18]The court's distinction between "pending federal cases" as opposed to completed cases or cases wherein no charges have yet been filed is not explained. Petitioner is unable to discern any distinction.

[19]To do so would substantially disorganize the records.

reason for petitioner's reluctance to disclose the vouchers is not because the payment is reflected on a client card, but because it will provide the client's name and purpose for the disbursement, thereby revealing the nature of the matter transacted by the firm in representation of the client. Also, by cross-reference to the other copy of the voucher which will be found attached to the matching invoice, statement, receipt or bill, greater detail of the transaction may be obtained, even to the extent of learning names and addresses of witnesses contacted."

Now, obviously, this objection cannot apply to every document contained in these records, but, as pointed out over and over to the court below, the only way to be sure is to examine each and every one of them and their relationship to all the others. Apparently it was petitioner's refusal to do this that led the trial court to conclude he was not acting in good faith."

Petitioner went to great lengths to devise some system whereby specific objections as to each document could be outlined for the court." However, in the end these efforts met with limited success. Petitioner so advised the court in the preface to the written objections:

> Objections to Production of Documents
> Pursuant to Grand Jury Subpoena:
>
> "The Court . . . required counsel to make specific objections to all documents contained in the record and

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"This was pointed out to the trial court in Volume II of the objections, under objections to Exhibits 848, 849, 850, 854, 855, 856, 857, 858, and 859: ". . . They contain information with regard to client names, setting forth details of work done for clients, expenditures incurred in behalf of clients, and show trips made to various places in behalf of the clients, would show telephone calls, to whom and where made, in behalf of clients. . . , reveal investigative work done in behalf of clients, including names of persons contacted, the place and time. . . ."

"Tr. Vol. VI, 658, 659, 660, 670-674; Vol. VII, 680-685.

"Tr. Vol. V, 490-554; Vol. VI, 616-674.

provided a two-week limitation of time. *This has been physically impossible to accomplish, and the burden imposed upon the law firm and the witness by this order is unreasonable and a violation of the Fourth Amendment . . . we find that after spending two weeks working day and night on these records, we have been unable to complete the task forced upon us by the Court . . .*

• • •

"*The extensive undertaking in order to particularize objections to specific documents has been unsuccessful.* We have attempted to categorize these records in various categories so that for the convenience of the Court objections could be stated as to categories of record and the Court could rule upon a number of records at one time. However, none of the categories which we were able to obtain are sufficient, for documents which fell in each category of necessity pertained to certain objections which did not pertain to other documents contained in the same category. Also, it was learned that by going through the documents, they were so varied in nature that each document would contain specific information which would raise a new ground for objection, and it has readily become apparent, assuming that the Fourth Amendment does not cover all of these documents, *the only way for this Court to properly rule as to the admissibility it will be necessary for the Court to individually examine each and every document and receive an objection thereto.* Such an undertaking itself would seem to be violative of the Fourth Amendment . . .

• • •

"Turning now to the records which have been presented to the Court, it must first be borne in mind that Exhibit 841, which contains the general journal of the firm, has already been delivered to the Grand Jury. This general journal amounts to providing the Grand Jury with a complete list of all of the checks that have been written,

along with a great deal of other information. Therefore, in examining the individual documents, it should be borne in mind that cross reference could be made from the general journal to these individual documents, which show very specific and detailed confidential information. . . .'' (See also Tr. Vol. VI, 616-674; Vol. VII, 680-685.) (Emphasis added.)

It is respectfully submitted that by proving the oppressive and burdensome nature of the task of making specific objections to individual documents establishes beyond doubt that the subpoena is violative of the Fourth Amendment,[33] and by refusing to submit to that oppression, petitioner was properly asserting valid constitutional rights. The trial Court's finding that this amounted to bad faith erroneously denied these rights to petitioner and injected a false and misleading issue into the case.

ARGUMENT

1. *The United States Department of Justice recognizes "that federal grand juries no longer serve a protective function and . . . that this institution has become merely a convenient tool of federal prosecutors."*[34]

Petitioner seeks this review because, in essence, the position of the respondent, which has been adopted by the lower courts, is that a grand jury subpoena duces tecum may be issued to obtain extensive confidential records of an attorney without prior knowledge of what they are looking

[33]This would apply even though it be held the Fourth Amendment objection had previously been waived.

[34]Quoting comments of Mr. Eilberg, United States Representative from Pennsylvania on the floor of the House of Representatives, December 5, 1974, Cong.Rec.-House 11354.

for and that there is no way such subpoena can be contested."

The argument of respondent is based upon the assumption that the grand jury is an independent arm of the court, exercising independent powers in pursuit of its independent investigation. Such could not be farther from the truth. The fact is that the United States Department of Justice has recognized that:

> ". . . in our judgment, the grand jury does not operate to protect the individual to any substantial degree, . . . nevertheless . . . for investigative purposes the grand jury is invaluable. It has the unique power at the investigative stage to subpoena witnesses to testify under oath and to produce documents and other physical evidence. . .
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> "The more highly organized criminal activity is, the more the ingenuity of the prosecutor is taxed . . . and in such situations the government needs the aid of grand jury process.
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> ". . . the sole substantial reason for having a grand jury today is to help the attorney for the government, when the need arises . . . the prosecutor should be able to utilize a grand jury according to his felt needs. Only

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"Freedom from executive intrusion into business matters is one of the cornerstones of our free enterprise system. However, in recent years the United States Department of Justice, supported by such holdings as *Branzburg v. Hayes*, 408 U.S. 665; *United States v. Bisceglia*; 420 U.S. 141; *United States v. Calandra*, 414 U.S. 338; *United States v. Dionisio*, 410 U.S. 1; *Bellis v. United States*, 417 U.S. 85, and others, has been successful in convincing lower courts, to greater or lesser degrees, that there are few, if any, restraints upon prosecutorial investigative powers via the grand jury. See, *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973); *United States v. Dinsio*, 468 F.2d 1392 (9th Cir. 1973); *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972); *In Re Schofield*, 486 F.2d 85 (3rd Cir. 1973); *In Re Schofield*, 507 F.2d 963 (3rd Cir. 1975). The opinion of the Tenth Circuit in this case goes to the ultimate extreme of effectively removing all adversary elements from grand jury proceedings and delivering all investigative powers of the grand jury to the federal prosecutor.

the prosecutor in an actual case is in a good position to determine when completion of the investigation requires resort to grand jury process. . . .'"[26]

It is submitted that this public recognition lays to rest the doubts expressed by this Court in *United States v. Dionisio*, 93 S.Ct. 764, at 773 (1973),[27] and that this case should be reviewed in the light thereof rather than based upon the fiction that the grand jury was acting independently and providing the "protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor. . .'"[28] which the grand jury was intended to provide when the Bill of Rights was adopted. See also *In Re Schofield*, 486 F.2d 85 (3rd Cir. 1973).[29]

When the fiction is erased, the issues change from being questions of "can the grand jury do this or that" to "can the federal prosecutor do this or that," and the Court is faced with the problem of should the federal prosecutor be permitted to continue to utilize these grand jury powers unrestrained, or should the Court adopt rules which return

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[26]Quoting letter from the Department of Justice dated September 10, 1974, addressed to The Honorable Peter W. Rodino, Jr., Chairman, House Judiciary Committee, House of Representatives, Washington, D.C., in response to a request from Mr. Rodino to have the Justice Department set forth its views regarding proposed legislation which would amend the Constitution with regard to federal grand juries. The letter was placed in the Congressional Record December 5, 1974, by Mr. Eilberg, United States Representative from Pennsylvania, Cong. Rec.-House 11354. For convenience, the text of this letter is set out in full in the Appendix, at page 27.

[27]". . . the grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor. . ." *United States v. Dionisio*, supra, at 93 S.Ct. 773.

[28]*United States v. Dionisio*, supra.

[29]"In considering those issues it is well to start with some fundamental propositions. First, although federal grand juries are called into existence by order of the district court, . . . they are 'basically . . . a law enforcement agency' . . . They are for all practical purposes an investigative and prosecutorial arm of the executive branch of government." *In Re Schofield*, 486 F.2d 85, at 89, 90.

some independence to the grand jury and restore the protective elements the grand jury was designed to provide.[20]

The importance of these questions today is illustrated by the legislation which is now pending before Congress to amend the United States Constitution so as to do away with the grand jury system.[21] If this is done, the protections which the framers of our Federal Constitution intended the grand jury to provide will be forever lost. A real tragedy.[22]

This case is now before this Court in a posture which, by candid analysis, brings face to face the opposing views of the raging debate as to whether the grand jury system can continue to serve a vital function in the administration of criminal justice.[23] By recognition, explanation, and re-

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[20]This case is not a unique situation where the federal prosecutor has tried to use the grand jury process to gain access to confidential information contained in an attorney's records. The following cases are examples of such attempts by the respondent in the recent past: *United States v. Jones*, 517 F.2d 666 (5th Cir. July 30, 1975); *United States v. Haddad*, Cause No. 75-1351 in the United States Court of Appeals for the 6th Circuit (no decision rendered by the Court of Appeals); *Ronald McKelvey v. District Director of Internal Revenue*, Cause No. 74-1813 in the United States Court of Appeals for the 9th Circuit (no decision rendered); *In Re Stolar*, 397 F.Supp. 520 (U.S.D.C., S.D.N.Y., July 8, 1975).

[21]In the 94th Congress, First Session, House Joint Resolution 46 (introduced by Mr. Eilberg, January 14, 1975).

[22]It is the position of petitioner that the general public today who may be called to serve as grand jurors are far better educated and much more sophisticated than they were in 1776, and it is fallacious to assume that they are incapable of performing the duties of conducting standard grand jury investigations without being under the thumb and control of federal prosecutors. It would seem that the opposite situation would be more desirable.

[23]See, e.g., Senior Judge William J. Campbell's article, *Eliminate the Grand Jury*, 64 J.Crim. L.C. & P.S. 174-182 (1973); *Administrative Agency Access to Grand Jury Materials*, 75 Col.L.Rev. 162 (1975); *Grand Jury Indictment Versus Prosecution by Information—An Equal Protection-Due Process Issue*, 25 Hastings L.J. 997 (1974); Note, *Criminal Procedure-Grand Jury-Government Must Demonstrate Relevancy Prior to Seeking Enforcement of Grand Jury Subpoenas Through Civil Contempt*, 5 Seton Hall L.Rev. 378 (1974); Recent Developments—*Grand Jury Subpoena Not a Fourth Amendment Seizure*, 11 Amer.Crim.L.Rev. 1087 (1973); *Use and Abuse of the Grand Jury in the Criminal Tax Investigation*, 50 Taxes, The Tax Magazine (1972); Comment, 35 Albany L.Rev. 403 (1971); Comment, *Grand Jury Secrecy: Waiver and the Public Interest*, 1974 Wash. U.L.Q. 153; Note, 40 Fordham L.Rev. 175 (1971); Remarks, CONG.REC.-HOUSE 11354 (daily ed. Dec. 5, 1974); CONG.REC.-HOUSE 10585 (daily ed. Dec. 5, 1974); CONG.REC.-HOUSE 9062 (daily ed. Oct. 15, 1973); CONG. REC. E3794 (daily ed. June 6, 1973).

vitalization of the protections provided by the rule of *Hale v. Henkel*, 201 U.S. 43 (1906), the grand jury can again become an effective protection against unwarranted governmental invasion of private rights. By adopting the position asserted by respondent, the Court will pave the way for legislative abolition of what has become a useless, time-consuming, expensive procedure which provides a fertile ground for litigation.

2. *Decisions of the Ninth and Third Circuit Courts of Appeal regarding petitioner's right to an evidentiary hearing conflict with the decision below.*

The respondent takes the position that the prosecution has no obligation to make any showing whatever of materiality and necessity (Resp. 22-27).[34] Respondent claims that, even so, a proffer was made in this case which established these two elements.[35] This is the crux of the issues presented by this case. Is the unsworn statement of an assistant United States Attorney sufficient? Must evidence be presented by the prosecutor?[36] If so, evidence which establishes what facts?[37] Is the subpoenaed witness entitled to

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[34]This position is directly contrary to the language of *Hale v. Henkel*, 201 U.S. 43, 77: ". . . some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers."

[35]Although not material to the issues presented for review, petitioner takes hot issue with respondent's implications that there was evidence before the grand jury indicating that the law firm was involved in illegal campaign contributions, kickbacks, and creation of false financial records (Resp. 10). An analysis of the unsworn verbal proffer made by the Assistant United States Attorney (Vol. I, 13-25) showing that there was no evidence indicating any improper conduct whatsoever by the law firm or any member was contained in petitioner's brief in the Court of Appeals, pages 15-17. In the light of these misleading implications, the Court is requested and urged to review the exact language of the proffer.

[36]Or will an affidavit suffice? At least one case has so indicated, *In Re Schofield*, 486 F.2d 85 (3rd Cir. 1973).

[37]The Third Circuit has adopted the rule that there must be a minimum showing that each item sought was "(1) relevant to an investigtaion, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose." *In Re Schofield (Schofield II)*, 507 F.2d 963 (3rd Cir. 1975).

test the accuracy or controvert such evidence?"[38] Assuming the facts stated in the proffer were adequately established, do they, in the light of strong evidence regarding the vast extent[39] and sensitive nature[40] of the records, suffice to carry the burden of proving[41] the subpoena was not unreasonable?[42] Or, is the rule as stated by the trial court that: "... the evidence ... before the grand jury is [not] material. It is what the grand jury is looking into" (Tr. Vol. I, 90).

While a grand jury may investigate on mere suspicion, *United States v. Bisceglia*, 420 U.S. 141, at 148, it does not follow that a subpoena as broad as the one here involved may be issued on that same suspicion.[43] What assurance does petitioner have, how can he obtain assurance, or how can anyone, including the court, know that the unchallenged proffer is nothing more than a guise to obtain a complete

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[38]The Ninth Circuit has held the witness "entitled to an uninhibited adversary hearing." *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973); *United States v. Dinsio*, 468 F.2d 1392 (9th Cir. 1973); *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972). As pointed out by petitioner in his brief in the Court of Appeals, if given an opportunity, petitioner would have offered evidence to show there is no factual basis for any suspicion of wrongdoing on the part of the law firm or any of its members (see footnote 35, supra).

[39]As to the extent of the records, see the Petition for Writ of Certiorari, pages 9-10.

[40]See Petition, pages 11-15. See footnote 20, supra. As pointed out in the Petition, the sensitive nature of these records can only be fully appreciated by examination.

[41]The prosecutor has at least some burden. *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972).

[42]A subpoena is unreasonable if it covers any records which are not material to the investigation.

[43]Petitioner's demand for an evidentiary hearing in which the government carries the burden of establishing that the subpoena is reasonable should not be confused with or considered satisfied by the hearings that occurred each time he was held in contempt (Tr. Vol. II, 184-250; Vol. IX, 910-967; Vol. XII, 1044-1088).

On each of these occasions, everything that had occurred before was taken into consideration, and the government did not offer any evidence in support of the subpoena other than the unsworn verbal proffer made in the beginning (Tr. Vol. I, 12-25). In each of these hearings, the prosecutor and the court proceeded under the assumption that the government had already made its prima facie case (Tr. Vol. I, 162-168; Vol. II, 185-188, 240-245; Vol. IX, 912-916, 948-950; Vol. XII, 1047-1050, 1076-1081).

list of the firm's undisclosed clients and other confidential client information,[44] or to discover evidence to be used against clients under indictment,[45] or to obtain attorney work product,[46] or to obtain information which would otherwise tend to incriminate the clients,[47] or determine who members of the firm or certain clients may associate with, including such things as organizational memberships, travel, etc.[48] or to generate publicity,[49] satisfy the personal animosity of the federal prosecutor and harass successful criminal lawyers,[50] or simply to obtain evidence which any governmental agency is seeking but cannot otherwise obtain.[51]

The only justification for this broad subpoena is that "the grand jury cannot possibly specify . . . without looking at all the . . . financial records" (Pet.App. 8a). What they are really saying is that they are justified in seeing the records because they don't know what the records will show.

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[44]The federal prosecutor has refused to state whether any persons known to be clients of the firm are targets of the investigation (Tr. Vol. IV, 328).

[45]The trial court recognized this possibility in holding that records pertaining to pending federal criminal cases in which indictments or informations had been filed should be removed before delivery of the records to the grand jury (Pet.App. 9a). The distinction between cases in which charges have actually been filed and cases in which they have not been filed, or in which the case has been tried and disposed of, is not explained by the court.

[46]There are involved a number of records pertaining to both civil and criminal federal cases, as well as state cases, from which details of work done for the client can be determined (Tr. Vol. IV, 326), not to mention the numerous cases which did not involve litigation in any court.

[47]See Petition, 25-29.

[48]Petition, 14. See Vol. II of Defendant's Written Objections. The records include an account card entitled "Account No. 7001, Dues", Exhibit 842-HH; also Account No. 7002, Employee Meetings, Defendant's Exhibit 842-II; Account No. 7003, Employee Recruitment, Defendant's Exhibit 842-JJ; Account No. 7005, Conventions and Seminars, Defendant's Exhibit 842-LL; Account No. 7000, Client Promotion and Development, Defendant's Exhibit 842-GG.

[49]See evidence re. news leaks (Tr. Vol. I, 101-107, 114, 115, 124-126; Vol. II, 214-221; Vol. IV, 309-381).

[50]See evidence to this effect (Tr. Vol. I, 41; Vol. IV, 353-359).

[51]*In Re Stolar*, 397 F.Supp. 520 (U.S.D.C., S.D.N.Y., July 8, 1975); *Administrative Agency Access to Grand Jury Materials*, 75 Col. L.Rev. 162 (1975).

Under this type of reasoning, it is difficult to envision a situation where the prosecutor could not come up with grounds for a subpoena.

Petitioner does not contend that under no circumstances should a bona fide grand jury investigation be permitted to go into such a mass of records.[52] But some safeguards must be established which will limit such intrusions upon private affairs to cases of clear necessity and justification.[53]

The position of respondent and the ruling of the courts below in this case not only conflict with the language of *Hale v. Henkel*, 201 U.S. 43 (1906), the rules of *Mara v. United States*, 454 F.2d 580 (7th Cir. 1971), and *Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956), cited in the Petition for Certiorari, but also conflict with holdings of the Third and Ninth Circuits which are even more in point.

The Ninth Circuit is firmly committed to the proposition that an evidentiary, adversary hearing must be afforded a witness against whom enforcement of a federal grand jury subpoena is sought. *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973);[54] *United States v. Dinsio*, 468 F.2d 1392 (9th Cir. 1973); *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972).

> ". . . [the witness] is entitled to an uninhibited adversary hearing. . ." *United States v. Dinsio*, supra, at 1394.

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[52]Nor is it contended that the grand jury in this case should not be permitted to examine any reasonable amount of the firm's records which can be shown to be material to the investigation they are conducting. See Petition, 15, 16.

[53]The federal prosecutor admitted they had knowledge of certain specific records they wanted to look at (Tr. Vol. VIII, 763).

[54]A hearing which consisted of a ". . . perfunctory reception of affidavits, a round of oral argument, and some offers for the record. . ." was insufficient; *United States v. Alter*, supra, at 1024.

The respondent's reliance on *United States v. Dionisio*, 410 U.S. 1 (1973), (Resp. 24-27) is misplaced. In the face of a similar contention, the Third Circuit distinguished the point here urged by petitioner from the holding of Dionisio:

> "Those cases did not involve the District Court's supervisory power over the proper use of its process in a grand jury proceeding. . ." *In Re Schofield*, 486 F.2d 85, at 89 (3rd Cir. 1973); cf. *In Re Schofield (Schofield II)*, 507 F.2d 963 (3rd Cir. 1975).

The rule thus adopted by the Third Circuit is that there must be at least:

> ". . . a minimum showing by affidavit in every case that each item sought was (1) relevant to an investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose." *In Re Schofield*, supra, 507 F.2d 963, at 966.

It is submitted that when the opinion of the Tenth Circuit Court of Appeals in this case is compared to those of the Ninth and Third Circuits, we have a full spectrum of attitudes expressed as to what necessity must be shown and what evidence of materiality produced to establish the reasonableness of a broad and far-reaching subpoena duces tecum in the face of a Fourth Amendment challenge.

The Supreme Court should, at this time, express its opinion upon these issues.

3. *The holding below that the records ordered produced are not protected by the attorney-client privilege conflicts with two recent decisions applying the privilege to such records and information.*

Assuming the facts stated in the proffer had been

adequately established, they do not, in the light of the strong evidence of the vast extent[21] and sensitive nature of the records covered by the subpoena issued in this case, suffice to carry the burden of proving that the subpoena is not unreasonable.

The documents covered by this subpoena which the court has ordered delivered to the grand jury provide detailed information regarding work done by the firm in its representation of its some 5,000 clients, including the client's name, trips made, telephone calls, and investigative work done, even to the extent of providing date, place, time and name of person contacted.[22]

Petitioner has contended throughout these proceedings that to be required to deliver these records to the grand jury constituted a gross violation of the attorney-client privilege. (Tr. Vol. I, 75, 80, 123; Vol. II, 212; Vol. IV, 289-291, 311-320; Vol. VIII, 765, 767, 795, 796, 797; Vol. X, 975, 976.)

The courts below treated this as a claim of an evidentiary privilege as opposed to a matter of substantive right and apparently held these records not protected under the attorney-client privilege because they did not contain "confidential communications" between attorney and client. (Pet. App. 8a, 9a, 10a, 14a-16a, 39a, 40a.)

This ruling is directly in conflict with the recent decision of the Fifth Circuit Court of Appeals in *United States v. Jones,* 517 F.2d 666 (5th Cir. July 30, 1975), where the court specifically considered the question of whether the

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[21]Petitioner's initial estimate was that these records contain in excess of 250,000 separate individual documents (Tr. Vol. II, p. 208). It is submitted that upon an impartial examination of these records, it will be found that this estimate was extremely conservative.

[22]See Footnote 20.

attorney-client privilege attaches to such matters as the identity of a client, information surrounding fees and bonding arrangements executed by or on behalf of the client. It was specifically held that such information was privileged under the common law attorney-client privilege. See also *In Re Stolar*, 397 F.Supp. 520 (U.S.D.C., S.D.N.Y., July 8, 1975), wherein the United States District Court for the Southern District of New York held that the telephone number and employment address of a known client was protected by the attorney-client privilege.

Certainly the attorney-client privilege should not be used by either an attorney or a client to cover illegal conduct. But the possible illegal conduct of one or two clients does not justify a violation of the confidential relationship of five thousand other persons. The confidentiality of the relationship is protected for the benefit of the client, not the attorney.

Thus, even assuming the proffer clearly established evidence of wrongdoing on the part of members of this law firm which could be discovered from these records and irrespective of any bad faith on petitioner's part, wholesale delivery of these records into the hands of the federal prosecutor is not justified until it has first been shown that the records of which the prosecutor has knowledge[47] and others which might come to its attention will not suffice for the present investigation and that there is no other means

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[47]In view of the admitted knowledge of specific records (Tr. Vol. VIII, 763), along with the fact that the investigation is concerned only with "wrongdoing in the political field" (Tr. Vol. I, 14), there must also be knowledge of which politicians are concerned (there are not many in federal office in the State of New Mexico), one becomes somewhat skeptical of the prosecutor's tactics of demanding all or nothing. Certainly, in the face of a genuine concern about statute of limitations problems (Tr. Vol. II, 249), and in view of petitioner's adamant refusal to release the records until he had exhausted his appellate remedies (Tr. Vol. X, 980), it would seem that a less extensive subpoena might have been appropriate.

by which the investigation can be completed[24] and even then delivery should be under close supervision of the court with appropriate safeguards.

The circumstances of this case then lead us to a balancing of the needs — proper and effective administration of criminal justice versus private and individual rights:

> "The general purpose of this privilege is to 'promote freedom of consultation of legal advisors by clients.' (Omitting citations.) To this end, the client must be assured that information conveyed in confidence to the attorney will not be ordinarily disclosed. Arrayed against this consideration is the public interest in obtaining disclosure of every man's evidence. (Citations omitted.) When these two principles clash a balance must be struck and an appropriate resolution will not be forthcoming by a wooden application of some general formula. The answer may lie, instead, in an analysis of the particular circumstances giving rise to the problem, ever mindful of the policy considerations which furnish a basis for the two principles." *In Re Stolar,* 397 F.Supp. 520, at 524.

It is submitted that the Court of Appeals below erred in holding the attorney-client privilege did not apply to the records ordered produced.

CONCLUSION

For these reasons a rehearing on the Petition for Certiorari should be granted.

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[24]The Court should consider, as was done in *Stolar*, supra, petitioner's numerous offers to assist the investigation in any manner possible which would avoid the mass intrusion upon these important rights in determining whether enforcement of the subpoena is unreasonable. (Pet. 15-16.)

Respectfully submitted,

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APPENDIX

DEPARTMENT OF JUSTICE

Washington, D.C., September 10, 1974

Hon. PETER W. RODINO, Jr.,

Chairman, House Judiciary Committee, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.J. Res. 752, H.J. Res. 774, and H.J. Res. 855, all of which propose amendments to the Constitution with respect to grand juries.

H.J. Res. 774 would amend the Constitution to provide that no grand jury could present or indict or otherwise hold any person to answer for any Federal offense. The only way to hold a person to answer for a Federal offense would be pursuant to an information signed by the attorney for the Government stating the essential facts of the crime charged. Congress would not be prevented, however, from legislating to create grand juries solely to investigate organized crime activity or any crime against the United States. We assume that such an investigative type of grand jury — the only type allowed for under H.J. Res. 774 — would be able to give the attorney for the Government non-binding advice as to whether he should file an information charging the commission of a Federal offense and could also, as the law might provide, issue reports on the order of the reports authorized under 13 U.S.C. 3333. However, the proposal would erect a barrier against any future use of a grand jury of the traditional type. The proposed amendment would be valid if ratified by the legislatures of three-fourths of the States within seven years after final passage of the joint resolution.

H.J. Res. 752 and H.J. Res. 885 propose the following identical amendments: "No person shall be held to answer for a capital, or otherwise infamous crime against the

United States, unless upon an information or by indictment of a grand jury, as Congress may prescribe." The amendment would be valid as part of the Constitution if ratified by the legislatures of three-fourths of the several States within seven years from the time of its submission by the Congress.

Such an amendment would not necessarily work any change in existing practice under the Fifth Amendment to the Constitution and Rule 7 of the Federal Rules of Criminal Procedure. The proposed amendment would simply subject what is now a mandated procedure to possible changes from time to time in the legislative process. Under the proposal the Congress could preserve or change the grand jury system or even abolish it entirely as it chose.

In the view of the Department, H.J. Res. 774, in abolishing altogether the indictment function of the grand jury, goes too far. On the other hand, H.J. Res. 752 and H.J. Res. 855, while not seriously objectionable, in our view do not go far enough. As will be seen, our position stems from a basic belief that, while the traditional role of the grand jury may be dispensed with in most cases, its use should be preserved in a limited number of situations. After discussing the above resolutions, the Department will accordingly urge that your Committee consider still a different approach to the problem.

At the onset, we commend to your Committee an article entitled "Eliminate the Grand Jury" in Volume 64, *The Journal of Criminal Law and Criminology*, pages 174-182 (1973) — This article was written by an eminent trial jurist, William J. Campbell, Senior Judge, United States District Court for the Northern District of Illinois. Besides being highly readable, the article contains citations to many cases, articles and treatises of pertinence to this discussion.

Judge Campbell is convinced that abolition of the grand jury would significantly improve our system of justice (*id.* at 181):

"Another important contribution which would result from the system I advocate would be a substantial increase in the efficiency and economy of our system of criminal justice. It cannot be doubted that the daily operation of grand juries in the communities across this land constitutes a very expensive project. Nor can we underestimate the unnecessary waste in the energies of our law enforcement and prosecuting personnel generated by the totally repetitious task of making presentations before the grand jury. The elimination of this needless squandering of resources would be a great boon to the administration of justice."

It seems evident that the grand jury system is passing away. In England, where the institution originated, the grand jury was abolished in 1933 (except for rare situations), and many of the states of the United States "have to a greater or lesser degree followed suit," with 23 states permitting prosecution of almost all crimes by either indictment or information (*id.* at 174). Time and change have simply overtaken the grand jury system. As a number of commentators have pointed out (1 Wright, Federal Practice and Procedure, p. 152 (1969)):

"Although in legal theory the role of the grand jury is the same as it always has been, necessarily it must perform a different function in a complex urban society than it was able to do in earlier times."

See also 8 Moore's Federal Practice—Cipes, Criminal Rules, pp. 6-9 (1973).

Possibly the most cherished rationale for the grand jury system is that it protects the individual against the prosecutor's "bipartisan passion or private enmity." *Ex Parte Bain,* 121 U.S. 1 (187). Whatever may have been true many years ago when the nation was less populous, it is highly questionable today whether any such protection for the individual is realized by having grand juries. Today the Federal prosecutor relies generally upon the investigative agencies to develop cases, and he will never previously have heard of the defendants in most of the matters presented

to him. Then, too, the grand jury performs a purely preliminary function; the proceedings are *ex parte*; only twelve members need agree that probable cause exists to indict while as many as eleven members may disagree; and the return of a no bill does not preclude further efforts by the prosecutor to establish basis for indictment. In that light it is certainly doubtful whether the grand jury system provides the individual any surer protection than that afforded him by the prosecutor's own sense of civic and professional responsibility and his certain desire to perform fairly and competently in the sight of the bench, the bar, and the public.

While in our judgment, the grand jury does not operate to protect the individual to any substantial degree, there is nevertheless good reason for preserving the traditional grand jury for use in a limited number of situations. For investigative purposes the grand jury is invaluable. It has the unique power at the investigative stage to subpoena witnesses to testify under oath and to produce documents and other physical evidence. While most cases are fully developed by investigative agents before presentation to the grand jury, a significant number of cases—often ones of the greatest importance—have to be developed in the grand jury utilizing its compulsory process.

The grand jury is of great value to the prosecutor in other respects as well. Considering the heavy burden of proof that has to be met in criminal cases, a prosecutor should be able to recognize the unappealing cases and to decline action upon them in the exercise of discretion, without wasting the time of the grand jury, but a prosecutor is well advised to use a grand jury as a sounding board in the novel or highly complex cases. It is vain to proceed with a logically valid theory of prosecution that cannot be made impressive or understandable to jurors. Further, the questions grand jurors ask of witnesses often reveal the latent difficulties in a case, and if an indictment can be won only upon a narrow division of the grand jurors, the prosecutor must reevaluate his situation. Since highly significant cases are often the difficult ones, such cases may arouse expressions

of difficulty by the grand jurors, but the crucial test is whether the jurors are strong for indictment at the finish, notwithstanding the difficulties.

H.J. Res. 774 recognizes how valuable the grand jury can be in organized crime cases particularly, but takes the approach that, if a grand jury is to be used, its role should be essentially advisory in nature. For the reasons stated, the Department believes that this approach goes too far; we would much prefer to leave open the option, in such situations, of having the jurors engaged to the extent that they would have to vote for or against indictment.

There can be no strong objection to H.J. Res. 752 and H.J. Res. 885, assuming as we do that the Congress would never act to deny the government the use of a grand jury, as might be necessary, to develop difficult or complicated cases. The more highly organized criminal activity is, the more the ingenuity of the prosecutor is taxed in bringing to justice those toward the top of the organization, and, in such situations, the government needs the aid of grand jury process. But the government may need the aid of such process to do justice in lesser cases. All in all, this Department is convinced that the approach taken in H.J. Res. 752 and H.J. Res. 885 can be improved upon markedly.

The constitutional amendment proposed in these two resolutions does not attempt to resolve question as to the standard by which legislation would be devised to distinguish the cases appropriate for handling under criminal information from those to be worked by a grand jury. Would the subject matter be the distinguishing factor? Would the procedure turn upon the particular felony provisions being employed, *e.g.*, by title and section designation? Or would the distinction have to be drawn in broader terminology to allow for a more desirable measure of flexibility? In our view none of these suggested solutions is the correct one. However, there is available a simple and workable answer which, if included in the proposed amendment, would obviate the necessity for future legislative grappling with the problem.

The preferable way of dealing with this subject matter, we submit, would be to provide that no person shall be held to answer for any crime against the United States, except under an information subscribed by the attorney for the government or upon an indictment of a grand jury, as the attorney for the government may elect.

We think that this approach is a sensible and proper one. It recognizes that a grand jury, despite the antiquated notion to the contrary, in fact is not a bulwark between the individual and the prosecutor. It is true that a prosecutor (and also a grand jury) may be moved at times to particularly strong feelings in a case, but if the prosecutor cannot be sobered by the necessity of proving his case beyond a reasonable doubt and of winning a unanimous verdict of guilty, then it would not seem very plausible to rely upon grand jurors to exercise the needed restraint. Besides, the grand jury might as likely supply vindication as restraint. Judge Campbell states the matter as follows in the article cited above (*id.* at 179):

"It has also been suggested that the mere existence of the grand jury acts as a deterrent to the presentation of unfounded accusations by overzealous and malicious prosecutors. Of course, no empirical data is available to support this theory. Although difficult to refute for the same reason, in my judgment both logic and my experience mitigates its persuasiveness. In the first place, the theory, like all others in support of the grand jury, presumes the existence of a strong independent body intelligently and carefully analyzing the evidence presented to it. As we have seen, such independence has long since vanished under the strain of outside forces. Moreover, this myth of grand jury independence affords the prosecutor anonymity in the exercise of his discretion. I suggest that the consequence of such misplaced responsibility for the initiation of a prosecution encourages, rather than stifles, mal-intended prosecution and character assassination."

This approach also recognizes that the sole substantial reason for having a grand jury today is to help the attorney

for the government, when the need arises, to discharge his prosecutive responsibilities by expediting and facilitating the criminal justice process. It follows that the prosecutor should be able to utilize a grand jury according to his felt needs. Only the prosecutor in an actual case is in a good position to determine when completion of the investigation requires a resort to grand jury process, or when the grand jury may be helpful in registering its reaction to a novel or complicated case or to the particular witnesses, or when grand jury experience with particular kinds of cases may be valuable in reviewing or refining law enforcement policy.

This Department does not anticipate any substantial risk of abuse if discretion is granted to permit prosecutors to make a sensible use of the grand jury system. What protects the individual against the abuse of ill-founded charges is not the grand jury but the arduous task of winning convictions. Poor cases are naturally sought to be kept out of court, not just because they represent a waste of time and resources, but because achievement by this Department of a very high rate of conviction is vital as a means of commanding public respect and support. On the other hand, no impropriety is apparent if the government should choose often to utilize the grand jury system. Once it is recognized that the mandatory grand jury system has become antiquated but that the grand jury at times may be employed to serve a useful function, then the question whether to use a grand jury often or seldom is one of effective administration. Accordingly, it would be proper, in amending the Constitution to do away with the mandatory grand jury requirement, to include a provision permitting the election in individual cases between the alternative means of initiating prosecutions.

Summarizing, then, in preference to H.J. Res. 774, or to either H.J. Res. 752 or H.J. Res. 885 in their present form, this Department would support a Constitutional amendment that would give the attorney for the government discretion in electing to proceed either by information or by indictment.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

W. VINCENT RAKESTRAW,
Assistant Attorney General.

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